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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/824,376	04/15/2004	Carl Erik Hansen	112701-574	6618
29157	7590	10/30/2006		
BELL, BOYD & LLOYD LLC P. O. BOX 1135 CHICAGO, IL 60690-1135				
EXAMINER PADEN, CAROLYN A				
ART UNIT			PAPER NUMBER	

1761

DATE MAILED: 10/30/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/824,376

Applicant(s)

HANSEN ET AL.

Examiner

Carolyn A. Paden

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 August 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____.
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- ☐ Notice of Informal Patent Application
- ☐ Other: _____.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-20 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-21, 23 & 25 of copending Application No. 10/819,180. Although the conflicting claims are not identical, they are not patentably distinct from each other because the fact that no specific amount of flavor is mentioned does not alone constitute unobviousness.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

The rejection of the claims under 35 USC 101 has been withdrawn because applicant amended the claims in the '180 application.

The rejection of the claims under 35 USC 112, first paragraph has been dropped in response to applicants' arguments. The rejection of claims 1, 3-14 and 16-20 under 35 USC first paragraph has been withdrawn in response to applicants arguments relating to the scope of enablement.

Claims 7 and 8 are rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for that disclosed in the specification, does not reasonably provide enablement for the use of enzymes in making the flavor attributes. The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to practice the invention commensurate in scope with these claims.

Applicant argues that one of ordinary skill in the art would know to use enzymes in making the flavor attributes of the claim. This has been

considered but does not alter the fact that the specification does not provide for the claimed feature.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-5 and 11-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ripper in view of Rusoff (2,835,890) for reasons of record.

Applicant argues that his chocolate is made by a standard process using conventional ingredients. This argument has been considered but the argument is not reflected in the text of the claims. Applicant recites specific ingredients for chocolate without support in the claimed invention. Applicant argues well known "consumer-recognizable flavour attributes." But most consumers would not recognize the named flavors of claim 2 in their favorite chocolate bar. Applicant argues that one of ordinary skill in the art would understand a chocolate flavor attribute to be one of many descriptors of claim 2 and not vanilla or chocolate or peppermint. This is

disagreed with. The flavor attributes of claim 2 are subjective descriptions of individual flavour profilers and not generally recognized flavours to one of ordinary skill in the chocolate manufacturing art.

Applicant argues that Ripper does not manipulate the flavor of chocolate by adding a non-cocoa/dairy flavor to the chocolate. This has been considered but is not persuasive because the rejection is not based on Ripper alone. The rejection relies on Rusoff to include the required flavors. Applicant argues that Rusoff is directed to making "Clutched flavor". This argument has been considered but is not persuasive. The reference is directed to making the same types of flavor set forth in claim 1. The flavors may have alternative uses but are also used as a fortifier or extender of natural chocolate flavor in confectionery products and column 4, lines 44-52 is relied on for support of this assertion. Applicant extrapolates the used of Rusoff to chocolate drinks but examiner cannot find a significant reference to beverages in the Rusoff patent.

Claims 1-4, 6 and 10-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ripper in view of Kleinert or Waterson for reasons of record.

Applicant argues that Kleinert does not add flavoring to the chocolate mass but rather only adds it to cocoa butter. This argument has been considered but is not persuasive. First the claims are rejected over Ripper in view of Kleinert or Waterson. At page 5, applicant argues that chocolate mass is made of a variety of ingredients including cocoa butter. But in this rejection, applicant argues that chocolate mass does not include cocoa butter. It appears that even applicant is confused as to what should be read into the claims. Second, Kleinert is used as a flavoring for Ripper in this rejection and not as a chocolate starting material. Applicants' additional arguments relating to Kleinert are not commensurate in scope with the claims because the claims do not require any specific set of ingredients or any particular process steps.

Applicant argues that Waterston does not provide a "consumer-recognizable flavor." But Waterston clearly shows the preparation of cocoa flavor. The flavors made were obviously "consumer-recognizable" because Waterston, as a consumer, detected cocoa flavor from the combination of ingredients.

No claim is allowed.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

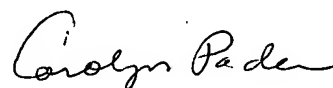
A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on (571) 272-1398 or

by dialing 571-272-1700. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



CAROLYN PADEN 1761
PRIMARY EXAMINER 10-26-06